

Religious Freedom and Groups

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America has a great tradition of religious liberty. James Madison, the architect of the First Amendment, said that this principle “promised a lustre to our country.”¹ In the twentieth century the Supreme Court enlarged the scope of the principle greatly when it applied the free exercise² and the establishment³ clauses to the states. Today all our government institutions, from the lowest municipal agency to the Congress of the United States, are obliged to respect the freedom of religion.

What is in doubt today is not the scope of the freedom but its strength. A right may cover certain people and activities, as a suit of armor may cover the wearer; but it may protect them only against certain attacks – against arrows, say, but not armor-piercing bullets.⁴ This concern, about the strength of our religious freedom, has attracted a lot of attention in the last twenty years, since the Supreme Court’s decision in *Employment Division v. Smith*.⁵ *Smith* held that the first amendment protects religious actors against discrimination, but not against laws that are neutral and generally applicable. So, for example, a law that forbids Mormons to run for office would be unconstitutional. But a law that forbids consumption of alcohol, applied to Catholics who took wine at mass, would not be.

I want to say a word about the *Smith* rule and religious groups. There is a tendency to deny protection to religious groups when their interests conflict with individual interests. (Protecting individual concerns is said to be a neutral reason for subordinating religious liberty.) There is something very American about this. In teaching about religious freedom we tend to adopt an individualist perspective. Our hypotheticals focus on religious dissenters: the Mormon office-seeker, the Catholic mass-goer, the Jehovah’s Witness peddling salvation door to door, the conscientious objector to the draft. Justice Douglas once said, by way of explaining his vote in a case, that “religion is an individual experience.”⁶ If this is so, then maybe group claims do not rise to the full dignity of first amendment rights; and this, on top of the *Smith* rule, explains why they lose out so often in competition with individual interests.

I don’t think Justice Douglas was right. For many people religion is a group experience. Churches are the paradigm example. The first two big Supreme Court cases after *Smith* involved churches. One, an Afro-Cuban religion, wanted to build a church in Hialeah where they would do animal sacrifice.⁷ One was a Catholic Church that wanted to enlarge its building against the wishes of a city historic landmarks commission.⁸ But there are many religious groups besides churches: schools,

¹ John Noonan, *The Lustre of Our Country* 4 (1998).

² *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

³ *Everson v. Board of Education*, 330 U.S. 1 (1947).

⁴ Frederick Schauer, *Must Speech Be Special?*, 78 Nw. U.L. Rev. 1284 (1983).

⁵ 494 U.S. 872 (1990).

⁶ *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting).

⁷ *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

⁸ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

hospitals, social service organizations; Mormon gymnasiums, Catholic Charities, the Fellowship of Christian Athletes, the International Network of Prison Ministries, and so on.

In modern American society these groups come into conflict with the law in two different ways. Though it was not always so, today the government regulates almost every aspect of daily life. Conflicts arise “from efforts by federal and state governments to provide welfare and unemployment benefits; to regulate health, education, labor relations, and the environment; to promote civil rights; to control fraud; and to administer a variety of tax programs.”⁹ Let me give a few examples.

- **Case 1.** A California law (the Women’s Contraception Equity Act) requires Catholic Charities to include prescription contraceptives in its health insurance plan. Catholic Charities believes that artificial contraception is sinful.¹⁰
- **Case 2.** The Massachusetts Department of Early Education and Care will not license adoption agencies that discriminate on the basis of sexual orientation in doing adoptions.¹¹ Catholic Charities had to give up its license because of its stand on gay marriage.
- **Case 3.** The California Court of Appeal has held that a Catholic hospital is guilty of medical malpractice if its emergency room won’t provide information about and access to the morning-after pill. The hospital viewed the morning-after pill under some circumstances as a form of abortion.¹²

This is one way that religious groups come into conflict with the government. The other arises from the government’s power to tax and spend. Dallin Oaks, a former law professor at the University of Chicago and a member of the Quorum of the Twelve Apostles in the LDS Church, hypothesized that there is a first amendment equilibrium of establishment and free exercise. As government accommodation of religion increases, so too does the amount of regulation.¹³ In the last quarter century we have seen such accommodation. The Supreme Court has abandoned its insistence on strict separation of church and state, and has allowed government support for parochial schools¹⁴ and religious providers of social services.¹⁵ During this same period the Court has relaxed its free exercise protection. It turned from a rule of strict scrutiny for any substantial infringement of religious liberty¹⁶ to a rule that does little more than forbid discrimination against religious actors.¹⁷

Oaks was not sure what produced this equilibrium. “It may be as simple as the common-sense operation of accountability and fairness[.]”¹⁸ The government has an interest in seeing that its money is spent in a way it approves of. More plainly, he who pays the piper calls the tune. Consider these cases:

- **Case 4.** The Salvation Army receives government funds for a domestic violence shelter. A federal court holds that it may not prefer employees who subscribe to its religious principles.¹⁹

⁹ McConnell, Garvey, and Berg, *Religion and the Constitution* 85 (2d ed. 2006).

¹⁰ *Catholic Charities of Sacramento v. Superior Court*, 32 Cal. 4th 527 (Sup. Ct.), cert. denied, 543 U.S. 816 (2004).

¹¹ 102 Code Mass. Regs. § 1.03(1).

¹² *Brownfield v. Daniel Freeman Marina Hospital*, 208 Cal. App.3d 405 (Ct. App. 1989).

¹³ Oaks, *Separation, Accommodation and the Future of Church and State*, 35 DePaul L. Rev. 1 (1985).

¹⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000).

¹⁵ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604A; *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Freedom From Religion Foundation v. McCallum*, 324 F.3d 880 (7th Cir. 2003). Cf. *Hein v. Freedom from Religion Foundation*, 551 U.S. 587 (2008). See generally McConnell, Garvey & Berg, *supra* note 9, at 397-398.

¹⁶ *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁷ *Employment Division v. Smith*, *supra* note 5.

¹⁸ Oaks, *supra* note 13, at ___.

- **Case 5.** The City of Cleveland has a voucher program in which parochial schools can participate. It forbids participating schools to discriminate on the basis of religion in admissions.²⁰
- **Case 6.** Catholic hospitals generally support the health care bills currently winding through Congress. But they worry that publicly funded plans will force hospitals to counsel about, refer and provide for abortions.²¹

All these cases have a similar alignment. On one side is a religious group (school, social service agency, hospital) asserting a constitutional right to act on its beliefs. On the other is an individual seeking some service (contraception, adoption, abortion, employment, education) that the group, for religious reasons, is reluctant to provide. The individuals invoke two kinds of reasons for preferring their interests over those of the group: a right to equal treatment, and a right to self-determination. Case 1 turns on a law that has “the purpose of eliminating a form of gender discrimination in health benefits.”²² Cases 2, 4, and 5 involve state and federal rules that forbid discrimination on the basis of sexual orientation and religion. Case 3 holds “that [the woman’s] right to control her treatment must prevail over [the hospital’s] moral and religious convictions.”²³ Case 6 might turn on the same principle. (The law is still in the pipeline.)

This is not a summary of the state of the law. Some cases come out the other way on these issues.²⁴ But the position I have described is an influential one, and it seems consonant with the very American ideals of personal equality and individual self-determination. Group rights seem to conflict with these ideals. A school that admits Baptists but not Muslims seems to deny the equality of persons. So too with a women’s shelter that won’t hire Catholics. A hospital that won’t do abortions makes it harder for a woman to determine the course of her health care. Why should the interests of an artificial entity trump these claims? People are real. Religious groups are not. They are just associations of people.

The first amendment (both the establishment and the free exercise clauses) tells us we should not insist that all religions share the same beliefs. This includes the belief that personal autonomy and equality are the fundamental building blocks in our system of values. In fact, for many Christian churches the fundamental unit is the group, not the individual. Here are statements of the point by influential Catholic and Protestant theologians:

God’s relationship to us and our relationship to God is not exclusively, nor even primarily, individual and personal. It is corporate and communal.²⁵

Not the individual but the ‘church’ is called, to it belongs the promise. . . . The individual . . . finds deliverance, but only because he belongs to the . . . community, not because of his personality.²⁶

¹⁹ Dodge v. The Salvation Army, 1989 WL 53857 (S.D. Miss. 1989).

²⁰ Zelman v. Simmons-Harris, *supra* note 14; Ohio Rev. Code Ann. § 3313.976(A)(4).

²¹ See America’s Affordable Health Choices Act of 2009, H.R. 3200 § 115 (111th Cong., 1st Sess. (2009).

²² 32 Cal.4th at 549.

²³ 208 Cal. App. 3d at 412.

²⁴ See, e.g., Combs v. Central Texas Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999) (sex discrimination in employment); Scharon v. St. Luke’s Episcopal Presbyterian Hospitals, 929 F.2d 360 (8th Cir. 1991) (same); Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) (religion-based hiring by a recipient of federal funds).

²⁵ Richard McBrien, *Catholicism* 731 (1981).

Such churches and religious groups are not voluntary associations of autonomous individuals. One might become a member without choosing to do so. A child of a Jewish mother is born a Jew. Baptism, the Christian rite of initiation, is often administered to infants. And faith is not a stance one voluntarily assumes. It is a gift from God.²⁷

The Supreme Court has acknowledged this point – that some religions put the group ahead of the individual – in disputes over the control of church property. The Episcopal Church in America has recently been divided over the ordination of gay bishops. When Gene Robinson, an openly gay man, was consecrated bishop of New Hampshire in 2004 the priest at the Church of the Redeemer in Rochester, New Hampshire, a Rev. Donald Wilson, refused to accept his authority. Wilson was removed, and the next Sunday 40 parishoners walked out of the service in protest. Suppose a majority of the parishoners sided with Wilson and voted to join the Catholic Church. Could they take the building with them – the physical Church of the Redeemer? The Supreme Court has held that courts should defer to the Episcopal Church on this question.²⁸ The canons of the Episcopal Church say the decision is up to Bishop Robinson.²⁹ This rule (the rule of deference to church authority) holds “that the Church as a spiritual body has liberties which will be given protection directly rather than derivatively[. And] it gives that protection to liberties which, in their essence, differ from those possessed by the members of the Church.”³⁰ When the Supreme Court announced the current, less protective, rule about religious freedom in *Smith*, it left this doctrine in place.³¹

In one way the church property cases are easier than the six I have posed. The conflict is between a church and its members, and there are reasons for siding with the church in this situation that don’t apply in disputes with nonmembers: perhaps that the members have impliedly consented to the rules; or they have accepted the benefits of membership and so should accept the burdens. You can’t say these things about a rape victim who shows up at a Catholic hospital, or a nonbelieving child who takes a voucher to a parochial school. On the other hand there is something uniquely insensitive about conscripting religious organizations to provide nonmembers with services that violate the group’s deeply held beliefs. This is particularly true when the services (for reproductive health, adoption, employment, education, etc.) are available from other providers.

This is a complex question, with refinements I do not have space to explore. One concerns the distinction between Cases 1-3 and Cases 4-6. The government *can* sometimes attach strings to its financial aid. If Massachusetts is paying agencies to handle adoptions, and the state recognizes gay marriages, it should be able to insist that funded agencies serve all married couples. On the other hand the state can not insist that funded agencies adhere to the political tenets of the Democratic Party. A second refinement concerns distinctions among religious groups. They are not all equally ‘religious,’ and consequently not entitled to the same degree of first amendment protection. There is a spectrum with

²⁶ Rudolf Bultmann, *Jesus and the Word* 47 (1958).

²⁷ Garvey, *What Are Freedoms For?* 148 (1996).

²⁸ *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). The Court allows states to choose this rule for resolving church property disputes. Alternatively, states may choose the rule of neutral principles. *Jones v. Wolf*, 443 U.S. 595 (1979).

²⁹ The Canons of the General Convention of the Episcopal Church, Canon 7 (1991).

³⁰ Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 *Harv. L. Rev.* 91, 92 (1953).

³¹ Laycock, *The Remnants of Free Exercise*, 1990 *Sup. Ct. Rev.* 1, 42-44.

churches at one end, and at the other, groups just faintly tinged with religious color. (Consider the degree to which Duke University is a Methodist institution.)

The point of this short paper is to argue that the constitution's guarantee of religious freedom extends to groups as well as individuals, and that the rules enforcing that guarantee should not reflexively favor individual interests over the rights of groups.